

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

Darlene B. Speker, Appellant,

v.

**Office of Personnel Management, Agency
(CSA 2 962 579).**

Docket Number DE08318910359

Date: June 11, 1990

Laurie M. Bauer, Mobridge, South Dakota, for the appellant.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued November 7, 1989, that sustained a reconsideration decision by the Office of Personnel Management (OPM) denying her request for an alternate form of annuity under the Civil Service Retirement System. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN OPM's reconsideration decision.

BACKGROUND

The appellant retired under the Civil Service Retirement System effective January 31, 1987. In April 1989, she requested an alternative form of annuity under the provisions of 5 U.S.C. § 8343a, which allowed certain retirees to elect a reduced continuing monthly annuity with a one-time lump sum payment of an

amount equal to the retiree's unrefunded contributions to the retirement fund.¹ OPM denied her request as untimely under its regulation, which required that such an election be received by OPM "on or before the date of final adjudication." 5 C.F.R. § 831.2203(e) (1988). The date of final adjudication is defined as the date 30 days after the date of an annuitant's first regular monthly payment. 5 C.F.R. § 831.2202. Since the appellant received her first regular monthly payment on October 1, 1987, her April 1989 request for an alternative annuity was filed almost a year and a half after the regulatory deadline.

Although the appellant admitted that her request was untimely under OPM's regulation, she contended that the time limit should be waived because she did not learn about the possibility of applying for an alternative annuity until discussing the matter with other retirees in March 1989. OPM contended, however, that it notified the appellant of her right to elect an alternative annuity, and of the time limit for making such an election, in a letter dated June 25, 1987. See Agency File, Tab 6. The appellant testified that she did not receive the letter. She also presented the testimony of Gail Martin, a Retirement Officer at her former agency, who said that other employees had informed her that they also had not received any notice of their right to elect the alternative annuity. Hearing Transcript (H.T.), Side 1A.

The administrative judge reasoned that the appellant did receive the June 25, 1987 notice, since it was correctly addressed. He further found that the agency sent the appellant a second notice in 1987 after the time for filing an election had expired, which informed the appellant that, since she did not file a request for an alternative annuity, her claim was being processed as a regular annuity.² See Agency File, Tab 6. Finding it improbable that the appellant did not receive at least one of the two mailings, the administrative judge found no basis to waive the regulatory time limit for making an election, and sustained OPM's reconsideration decision.

¹ Section 8343a, which became effective on June 6, 1986, was added by the Federal Employees' Retirement System Act of 1986, Pub.L. No. 99-335, § 204(a), 100 Stat. 514, 591-92. The law was subsequently amended to provide for two lump-sum payments instead of a single payment for those whose retirement annuities commenced after January 3, 1988. Act of Dec. 22, 1987, Pub.L. No. 100-203, § 6001, 101 Stat. 1330, 1330-275; Act of Dec. 12, 1989, Pub.L. No. 101-227, § 2, 103 Stat. 1943; Act of Dec. 19, 1989, Pub.L. No. 101-239, § 4005, 103 Stat. 2106, 2135.

² The administrative judge stated that the appellant did not deny receiving the second notice. A review of the Hearing Transcript shows this statement to be erroneous. The appellant specifically testified that she did not receive the document in question. See H.T., Side 1A.

In her petition for review, the appellant contends that the administrative judge erred in finding that she had received notice of her election rights, and renews her argument that she is entitled to a waiver of the time limit. We agree with the first contention, but find no basis for waiving the time limit.

ANALYSIS

The appellant proved by preponderant evidence that OPM did not notify her of her right to elect an alternative annuity.

One who asserts an entitlement to a retirement benefit bears the burden of proving by preponderant evidence that she meets the applicable criteria for such entitlement. 5 C.F.R. § 1201.56(a); *cf. Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986) (the burden of proving entitlement to a survivor annuity is on the applicant for benefits), *cert. denied*, 107 S.Ct. 891 (1987). As the party seeking a retirement benefit, and thus waiver of the missed election deadline, the appellant had the burden to prove that OPM failed to notify her of her right to elect an alternative annuity.

The appellant testified that she did not receive the June 25, 1987 notice that OPM claims to have mailed to her, and that she only learned about the possibility of electing an alternative annuity in 1989. The appellant's testimony was bolstered by Ms. Martin's testimony that other retirees reported that they did not receive any notice from OPM regarding alternative annuities. We find that the evidence adduced by the appellant as to receipt of the June 1987 notice was sufficient, unless rebutted by OPM, to carry her burden of proof on this issue.

To raise a rebuttable presumption that the letter dated June 25, 1987, was received by the appellant in due course, OPM was required to provide testimony or affidavit evidence that the letter was properly sealed, stamped, addressed, and deposited in the United States mails, or to present documentary evidence, such as a certified mail receipt, showing that the letter was delivered as claimed. See *Harris v. Office of Personnel Management*, 39 M.S.P.R. 293, 299-300 (1988), *rev'd in part and remanded on other grounds*, 888 F.2d 121 (Fed. Cir. 1989); *Davies v. Office of Personnel Management*, 5 MSPB 251, 5 M.S.P.R. 199, 202-03 (1981). In the context of a program designed to provide notice to a large number of persons, as was alleged by OPM here, proof of the agency's regular business practice for mailing such notices, coupled with evidence that it followed that practice in the instance at issue, would suffice. See *Darsigny v. Office of Personnel Management*, 787 F.2d 1555, 1559 (Fed. Cir. 1986); *Leyson v. Office of Personnel Management*, 31 M.S.P.R. 111, 114 n. 2 (1986). OPM presented no such testimony or affidavit evidence, however. It merely provided a photocopy of the notice, together with an unverified statement that the notice was mailed. We therefore find that OPM failed to rebut the appellant's evidence of nonreceipt.

We find, in addition, that the administrative judge's conclusion that OPM sent the appellant a second notice advising her of her entitlement to elect an alternative annuity is completely without support in the record. The claimed "notice" is neither addressed nor dated, and OPM did not provide even an unverified statement that the document was mailed to the appellant.³ See Agency File, Tabs 2, 6.

OPM's failure to notify the appellant of her right to elect an alternative annuity provides no basis for waiving the time limit.

There are only three bases for waiving a filing deadline prescribed by statute or administrative regulation. First, the statute or regulation may itself specify certain circumstances in which the time limit will be waived. *E.g.*, 5 C.F.R. § 1201.114(f) (the Board will waive the time limit for filing a petition for review for good cause shown). The regulation at issue in this appeal, however, does not provide for waiver of the time limit.

Second, an agency's affirmative misconduct may preclude it from enforcing an otherwise applicable rule under the doctrine of equitable estoppel. See *Richmond v. Office of Personnel Management*, 862 F.2d 294, 299-300 (Fed. Cir. 1988), *cert. granted*, 110 S.Ct. 46 (1989). That doctrine has no applicability here, since the appellant has not alleged that OPM affirmatively misled her as to the filing deadline, only that OPM failed to notify her of her right to elect an alternative annuity.

Third, an agency's failure to provide a notice of election rights and the filing deadline as required by statute or regulation may warrant a waiver of the filing deadline. See *Harris v. Office of Personnel Management*, 888 F.2d 121, 124 (Fed. Cir. 1989) (waiving the one-year time limit for electing a survivor annuity); *Davies v. Office of Personnel Management*, 5 MSPB 251, 5 M.S.P.R. 199, 203 (1981) (same). The statute at issue here, 5 U.S.C. § 8343a, did not require OPM to notify retirees of their right to elect an alternative annuity. Although OPM's own regulations now require such notice, this requirement was not promulgated until after the appellant's time limit for electing an alternative annuity had already elapsed.⁴ OPM's failure to notify the appellant of her right to elect an alternative annuity therefore did not relieve her of the obligation to comply with OPM's time limit. *Cf. Ader v. Office of Personnel Management*, 28 M.S.P.R. 448, 449 (1985) (no basis for waiving one-year time limit for electing survivor annuity where

³ See footnote 2 above.

⁴ The current notice requirement, 5 C.F.R. § 831.2203(e)(1)-(2) (1989), was promulgated on April 8, 1988, and became effective on January 4, 1988. See 53 Fed. Reg. 11,633 (1988).

statute requiring annual notice to annuitants of election rights was not enacted until after deadline had passed).

The evidence in this case shows that the appellant, through no fault of her own, did not become aware of her statutory entitlement to elect an alternative form of annuity, or of the time limit for doing so, until after the deadline had passed. Although enforcement of the time limit in these circumstances may appear unfair, we find no basis for requiring OPM to waive it.

ORDER

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.